

ELECTIONS: Names of Appellate judges must be published.
Returns of result of vote on retention of judges
and initiative questions must be separate.

April 27, 1942

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for
an official opinion which reads as follows:

"Amendment to Art. IV, Constitution of Missouri, passed by vote of the people Nov. 5, 1940, known as 'Non-Partisan Court Plan' provides for filing with me, not less than 60 days prior to the November general election, of declarations by supreme judges or appellate judges who desire to succeed themselves. I am then required to certify their names to the county clerks, and a separate ballot must be provided by means of which the voters express themselves on the question of retaining said judges. The amendment recites: '.... and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative.'"

"May I be favored, please, with your opinion on the following problems, this being our first experience with the new law:

"1. Measures proposed by initiative in the past have been advertised in newspapers and placed on the separate ballot along with proposals to amend the Constitution submitted by vote of the General Assembly. It is required that names of candidates for office be advertised in newspapers. The question, Shall there be a convention to revise and amend the Constitution, must likewise be advertised in newspapers. (Sec. 11682RS"39; Sec. 11677.) Is it also my duty to include in such advertisements the question of the retention of supreme and appellate judges? If so, may I have your suggested wording and heading for such advertising?"

"2. To avoid waste of paper, binding and filing space, may I prepare returns to this office, to be filled out by County Clerks, including on one return sheet, by precincts, the vote for and against each proposed constitutional amendment and initiated law, the vote for and against the question, Shall there be a convention to revise and amend the Constitution, and the vote for and against the retention of the judges whose terms expire Dec. 31, 1942, viz: Judge Tipton, Judge Leedy and Judge Hays, plus any circuit judges in Jackson County and in St. Louis City whose terms expire at the end of this year? In other words, may I have one sheet for the candidates' votes, and another sheet for the returns on these three separate ballots?"

1.

THE QUESTION OF THE RETENTION OF SUPREME AND APPELLATE JUDGES SHOULD BE ADVERTISED.

At the general election of 1940 the people of Missouri amended the Constitution by adding to Article VI seven new

sections which were known as the "court plan." This plan provided that a judge of the Supreme Court of Missouri and a judge of the Appellate Courts of Missouri at the expiration of his term could submit his name to the voters of Missouri and they would vote whether or not he would be retained in office. Section 3 of this amendment provided that:

"* * * the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative."

Section 11676, R. S. Mo. 1939, provides as follows:

"Whenever a proposed constitutional amendment or other question is to be submitted to the people of the state for popular vote, the secretary of state shall duly, and not less than twenty days before the election, certify the same to the clerk of each county court of the state, and the clerk of each county court shall include the same in the publication provided in section 11542."

While Section 11676, supra, is incorporated in Article IX which deals with constitutional amendments, still a re-search of the history of this section discloses that when it was passed in 1889 it was included in the general election

laws and, therefore, must be taken in its plain meaning as to apply to a constitutional amendment or "other question" to be submitted to the people of Missouri for a public vote. We believe it is obvious that a vote upon an initiative petition is included within this phrase. Under Section 3 of the constitutional provision quoted above, the ballot, on the question of whether a judge should be retained in office or not, is governed by the same law relating to measures proposed by the initiative.

Section 11542, R. S. Mo. 1939, referred to in Section 11676, supra, provides as follows:

"At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state, and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election: Provided, that no higher rates shall be paid per inch, than is provided by section 14966, chapter 119, R. S. 1939, as amended."

"We are, therefore, of the opinion, in view of the above authorities, that the names of those judges who are to be voted on in the general election as to whether they shall be retained in office or not, should be published in those newspapers designated in Section 11542, R. S. Mo. 1939, along with the other candidates and propositions.

2.

ELECTION RETURNS ON THE GENERAL VOTE,
CONSTITUTIONAL AMENDMENTS AND CONVEN-
TION, INITIATIVE VOTE, AND RETENTION
OF JUDGES SHOULD BE SEPARATE.

Sections 11609 to 11615, R. S. Mo. 1939, provide in substance for the returning of the poll books by the judges and clerks of the election to the county clerk and the casting up of the votes by the county clerk and two justices of the peace sitting as a canvassing board.

Section 11681, R. S. Mo. 1939, provides as follows:

"The election on such proposed constitutional convention, on the adoption of a new constitution, or on any constitutional amendment or amendments, shall be conducted and the returns made thereof to the several county clerks, and shall by them be certified to the secretary of state, as provided by law in cases of the election of state officers."

Section 12293, R. S. Mo. 1939, which deals with the returns of the vote cast upon initiative questions, which law governs the procedure to be followed in dealing with votes cast for the retention of judges, is somewhat different. This section provides as follows:

"The votes on measures and questions shall be counted, canvassed and returned by the regular boards of judges, clerks and officers as votes for candidates are counted, canvassed and returned, and the abstract made by the several county clerks of votes on measures shall be returned to the secretary of state on separate abstract sheets, in the manner provided for abstract of votes for state and county officers. It shall be the

duty of the secretary of state, in the presence of the governor, to proceed within thirty days after the election, and sooner if the returns be all received, to canvass the votes given for each measure; and the governor shall forthwith issue his proclamation, giving the whole number of votes cast in the state for and against each measure and question, and declaring such measures as are approved by majority of those voting thereon to be in full force and effect as the law of the state of Missouri from the date of said proclamation: Provided, that if two or more measures shall be approved at said election which are known to conflict with each other or to contain conflicting provisions, he shall also proclaim which is paramount in accordance with the provisions of section 12292."

(Underlining ours.)

In 29 C. J. S. page 332, it is said:

"The form of the statement of the result is prescribed by statute.
 * * * * *

"As a rule, where an election has been honestly conducted, mere irregularities in the return will not necessarily be sufficient ground for rejecting it, statutes regulating the character of the return being regarded as directory and not mandatory. However, material irregularities such, for instance, as failure to state the offices for which votes have been cast for candidates, * * * * * will require rejection of the returns."

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Therefore, we believe that while the returns of the result of the vote on the constitutional amendments and the constitutional convention may be included in one return, still, since Section 12293, supra, provides that such abstract of the vote shall be separate, we believe that the returns of the vote on the initiative questions and the question of whether the appellate judges shall be retained in office should be separate.

Respectfully submitted,

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APPROVED:

ROY MCKITTRICK
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